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No. 38

In the Supreme Court of the United States

OCTOBER TERM, 1967

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.,
PETITIONER

v.

C. GORDON ANDERSON, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PHILIP A. LOOMIS, JR.,
General Counsel,
DAVID FERBER,
Solicitor,
Securities and Exchange Commission,
Washington, D.C. 20549.

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We are filing this reply brief to correct possibly misleading impressions that may be created by respondents' quotations from district court statements by the Commission's counsel and by reference to material that is not part of the record.

1. The quotation on page 15 of respondent Anderson's brief appears to suggest that Commission counsel was of the view that Anderson "should be considered" for the management of the reorganized company. Commission counsel made it abundantly clear at that point, however, that the Commission opposed Ander-

281-289—67

son's appointment to the reorganized company. He stated that "the Securities and Exchange Commission has heretofore filed in this proceeding objections to the Trustee's becoming a salaried officer of the reorganized debtor and expects to support the Stockholders' Committee on that issue in the appeal"; that "we take the view it is not in the public interest to appoint the Trustee as manager" (II 995); and that, although the trustee might be "able and capable," a trustee who "has an interest in the future outcome of the proceedings would not be able to act impartially as we feel Congress intended * * *" (II 995–996). In the face of these unequivocal statements the noncommittal comment that Anderson "should be considered" obviously did not have the meaning or significance Anderson apparently ascribes to it.

2. During Commission counsel's cross-examination of the trustee, he asked the latter to explain the bases of "the alleged compromises of the Shaffer-Spitzer mortgage claim, and the Merrill-Stevens claims" (II 283). When the trustee replied "I will be glad to," the district judge stated that he had a number of other matters to handle, and that "if you are going on here all day, I will just continue this to another day" (*ibid.*). Commission counsel then stated, "I have concluded" (*ibid.*). Respondents Shaffer and Spitzer (the Caplan mortgagees) three times suggest (Br. pp. 17, 22, 28) that by this statement Commission counsel indicated that he was satisfied that there had been an adequate explanation of the bases of the compromises.

The statement does not bear the explanation they ascribe to it. On the contrary, the ensuing testimony and colloquy demonstrate that Commission counsel was stating only that the compromises were the sole remaining subject on which he wanted to cross-examine. Following the "I have concluded" statement the court instructed the trustee to answer the question concerning the bases of the compromises. The trustee then gave his explanation of the Merrill-Stevens settlement (II 283–284). Commission counsel then asked the trustee to answer the portion of the question "directed to the compromise of the Caplan mortgage claim" (II 284). After the trustee explained that compromise, Commission counsel stated:

> There are many factors, of course, which are involved in the compromising of these claims other than those upon which Mr. Anderson has touched. There are some comments that I was prepared to make which, if the Court will give the time, I should like to [II 285].

In response to the court's suggestion, these comments were included in the Commission's memorandum on the proposed plan of reorganization filed shortly thereafter (II 722, 735–740). It stated (II 739) with respect to the treatment of the Caplan mortgage:

> There is nothing in the record to justify the trustee's retreat from * * * [his] prior position in his report [that "causes of action and defenses exist against the holders of the Caplan Mortgage, individually and as a group * * *," II 606].

The memorandum also stated in detail why the settlements of both the Caplan and the Merrill-Stevens claims were unfair (II 735–740).

3. Respondent Anderson's brief (p. 35) refers to "an example of the type of information which the trustee's counsel examined during his investigation, which does not appear of record * * *." This off-the-record "example," suggesting that Merrill-Stevens was not responsible for the breakdown of the Carib Queen, refers to portions of a written report submitted by the Commission to the trustee, which summarized the strengths and weaknesses of the debtor's defenses, offsets, and counterclaims to the Merrill-Stevens claims. The report in its entirety did not convince the Commission that these defenses, offsets, and counterclaims were without merit, since the Commission did not withdraw its previously filed objections to the claims (II 1093). Instead, at about the time the report was being completed, the Commission filed specifications regarding these objections (II 2).

In view of the difference of opinion between the Commission and the trustee as to the merits of these claims and the fact that the trustee himself had moved for a hearing by a Special Master on the Commission's objections (II 862), the trustee should at least have explained on the record the detailed considerations that induced him to reach the settlement with Merrill-Stevens. For without such an explanation neither the court nor the other parties could make any informed

judgment as to whether the compromise of that claim was fair.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PHILIP A. LOOMIS, JR.,
General Counsel,
DAVID FERBER,
Solicitor,
Securities and Exchange Commission.

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